The PRESIDING OFFICER. The Senator is correct.

Mr. RANDOLPH. Mr. President, I yield to the Senator from Ohio [Mr. YOUNG], with the understanding that I do not lose my right to the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. RANDOLPH. Mr. President, I ask unanimous consent that the rule of germaneness be waived for the remainder of the day.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. RANDOLPH. Mr. President, I shall discuss the Appalachian regional development bill later in the afternoon; but it is my desire now to accommodate Senators who wish to discuss subjects not pertinent to that measure.

Mr. METCALF. Mr. President, will the Senator yield?

Mr. RANDOLPH. I yield to the Senator from Montana.

Mr. METCALF. I wish to speak briefly on reapportionment problem. Will the Senator from West Virginia yield to me after the Senator from Ohio has completed his remarks?

Mr. RANDOLPH. I shall yield first to the Senator from Ohio, and immediately afterward to the Senator from Montana.

AMENDMENT OF FOREIGN ASSISTANCE ACT OF 1961—CLOTURE MOTION

The Senate resumed the consideration of the bill (H.R. 11380) to amend further the Foreign Assistance Act of 1961, as amended, and for other purposes.

Mr. YOUNG of Ohio. Mr. President, the pending amendment regarding the Supreme Court reapportionment decisions is one of the most important and far-reaching legislative proposals ever to come before the Senate. How we act upon it will shape the governments of all our States, the Federal Government and the lives of all Americans for generations to come. It is unfortunate that a legislative proposal of such great significance should be hurriedly debated and given half-hearted consideration.

The Senate debated the recently enacted civil rights bill for more than 100 days. The bill before us is also a civil rights bill, for it affects the voting rights of well over half of the citizens of our Nation. Stripped of all its verbiage, the amendment comes down to the essential question of whether we are willing to recognize the concept of "one man, one vote" in our democracy. It is foolhardy to try to resolve this issue hurriedly and without careful deliberation during the closing days of the Congress in the charged atmosphere of an election year campaign.

It is, perhaps, regrettable that the Federal Courts had to intervene in this matter. However, the States asked for it. They have had years to take some corrective action but, in most instances, have done nothing. In fact, by doing nothing, many States violated their own constitutions. The people who are being deprived of fair representation—for the most part Americans living in metropolitan areas—had no alternative but to appeal to the Federal courts once their petitions were rejected by their State courts.

The Supreme Court ruling was, quite simply, a ruling in favor of fair representation for all citizens. The pending amendments is, by admission of its chief sponsor, in reality an attempt to gain time so that a constitutional amendment can be adopted which would strip the Supreme Court of its power to rule on apportionment cases. This legislative proposal is no postponement of the issue; it is no breather to give State legislatures time to reapportion themselves. In effect, it will allow evil to perpetuate itself. It will permit present State legislatures, many of which are comprised of representatives from counties having only a fraction of the population of other counties, to have the same total representation in the State legislature, and the opportunity to prevent reapportionment for decades to come. Never before was the adage "Justice delayed is justice denied" as appropriate to the circumstances.

Not only will this affect the composition of our State legislatures but also of our Federal Government. The legislature of each State draws the boundaries for congressional districts. Under the status quo, rural-dominated legislatures have to a great extent so gerrymandered their States that citizens living in cities and their suburbs do not have fair representation in the House of Representatives of the U.S. Congress. The proposal is nothing more than a blatant attempt to stop the clock of progress and to perpetuate a system whereby millions of our citizens do not receive fair representation in the legislative bodies of this Nation.

There are numerous examples of some State legislatures sitting for 50 years or more without so much as acknowledging the requirement of their own State constitutions regarding apportionment. I am glad to say that in my State of Ohio the situation is not so desperate. However, even in Ohio there is a need for reform. The Ohio constitution grants at least one representative in the State house of representatives for each of the 88 counties. This is because of the so-called Hanna amendment. It was adopted under the leadership of Marcus Alonzo Hanna, who was then the boss of the Republican Party in Ohio and was ambitious to become a Senator of the United States at a time when the legislatures of the various States elected U.S. Senators. Following the adoption of the Hanna amendment, under which each of the 88 counties had at least 1 representative in the State legislature, Hanna was in fact chosen by the Legislature of Ohio and represented my State as a Senator of the United States. That was a good many years ago.

Vinton County, one of Ohio's 88 counties, has a population of 10,274. Cuyahoga County, in which I live, has a population of more than 1,600,000. Cuyahoga County has 17 members of the House of Representatives of the General Assembly of Ohio, and Vinton County, having a population of 10,274, has 1. My vote in Cuyahoga County is worth a very small fraction of the vote of a resident of Vinton County, when it comes to the selection of a member of the House of Representatives of the General Assembly of Ohio.

Lake County, which adjoins Cuyahoga County to the east, has a population of 148,000. Also adjoining both Cuyahoga and Lake Counties is Geauga County. The difference is not quite so bad there; but Geauga County, with a population of 48,000, has one representative in the General Assembly of Ohio. The same sort of people, having the same interests, live in Cuyahoga, Lake, and Geauga Counties. Yet Lake County, with a population of 150,000 compared with its neighboring county of Geauga, with 48,000, has but one representative in the general assembly.

The 68 less densely populated counties of Ohio, with a population of 2,760,000, have 68 representatives in the House of Representatives of the Ohio Legislature. The remaining 20 more heavily populated counties of my State having a total population of 6,946,000, have only 66 representatives in the legislature. The result is that 28.4 percent of Ohio's population has 50.7 percent of the seats in the house.

Regarding the State senate, I am glad to note, that the situation in Ohio is not so bad. There, it would require only a minority of 44.8 percent to elect a majority.

In addition, the amendment represents a wrong of even greater magnitude. It is also an attempt on the part of some persons to discredit and weaken the Supreme Court of the United States because those citizens disagree with many of the important decisions handed down by that great Court, of which we all have good reason to be proud.

The proposal strikes at the heart of the Federal system of checks and balances. It strikes at the very heart of our democracy. It seems to me unconscionable for Congress to allow itself to be used for such purposes. I strongly urge that this legislative proposal be tabled or laid aside until it can receive the consideration due it by what has been termed the greatest deliberative body in the world.

I firmly believe that votes should be cast by persons on an equal basis. As one born and reared in a rural county—I was born in Puckerbrush Township in Huron County, Ohio, a county not far distant—perhaps 50 miles—from Cuyahoga County, where I now live. Huron County is strictly a rural county with a population of approximately 47,000.

I know from living in a rural area of Ohio, and from having lived in urban areas of my State, that citizens of our cities will not act unjustly, capriciously, or vengefully in legislative matters.

Equal representation for all citizens without discrimination cannot be dangerous, despite the view of those who are opposed to this, including my opponent in Ohio for election as a Senator, come November.

On what basis, for example, does he regard citizens of Franklin County or Cuyahoga County, or of his own Hamilton County—which contains the very fine and beautiful city of Cincinnati—

to be intellectually or morally inferior to citizens of Union or Vinton Counties?

I ask unanimous consent to have an editorial printed in the RECORD which was published in the Cleveland Press on Saturday, August 15, 1964, entitled "Taft Knows Better"; also an editorial published in the Toledo Blade of August 22, entitled "Unjustified Means"; and an editorial published in the Akron Beacon Journal of August 5, entitled, "Stopping the Clock." These three newspapers, the Cleveland Press, the Toledo Blade, and the Akron Beacon Journal, are regarded by knowledgeable people throughout the United States as among the greatest and the most respected newspapers in the Nation.

There being no objection, the editorials were ordered to be printed in the RECORD, as follows:

[From the Cleveland Press, Aug. 15, 1964]

TAFT KNOWS BETTER

Congressman ROBERT TAFT, a big-city Republican (Cincinnati), can't be allowed to go unchallenged on his statements Thursday regarding Ohio apportionment.

TAFT denied that Ohio's Legislature was dominated by rural elements. He said he knew because he had served there for 6 years.

How could the Congressman have served for that long and not know:

That 28.4 percent of Ohio's population has 50.7 percent (a majority) of the regular house seats in Columbus? Or, to put it another way—

That the 68 smallest counties, population 2,760,608, have 68 regular representatives—while the 20 largest counties, population 6,945,789, have only 66 seats? And also—

That the seven largest counties have 51.8 percent of Ohio's population and only 35.8 percent of the regular house seats?

The two most powerful figures in the legislature—Representative Roger Cloud and Senator Stanley Mechem—stride from the cornfields into the capitol. And their control over lawmakers could hardly be more complete.

TAFT was testifying for a constitutional amendment which would stymie reapportionment of Ohio's house, ordered by the U.S. Supreme Court.

In supporting this amendment, Congressman TAFT said he feared the rural counties of southern Ohio would be underrepresented if population were the sole consideration for legislative seats.

What does TAFT think of the plight of underrepresented city dwellers in Cuyahoga and Lake Counties, to name only a couple?

Would he rather represent wornout coal mines and pine trees or people?

[From the Toledo (Ohio) Blade, Aug. 22, 1964]

UNJUSTIFIED MEANS

As the Senate continued to wrestle over Senator EVERETT DIRKSEN'S effort to postpone application of the Supreme Court's State reapportionment rulings, some commentators began to look beyond his tactics to find merit in his goal.

Columnist Walter Lippmann, for instance, declared in last Tuesday's Blade that there is a great deal to be said in favor of taking a breather in the reapportionment battles. In brief, his argument was: So drastic a change in our political structure as the realinement of representative power is a proper subject for deliberation and debate. Congress and the people should be brought into the decision through, say, a proposed constitutional amendment to modify the rules laid down by the Court.

Consequently, Mr. Lippmann found these advantages in delay of such overriding importance as to excuse Senator DIRKSEN'S technique, which the columnist conceded is "a bit awkward and rather inconvenient."

We, too, can see the value in carefully weighing the full potential impact of the Court's mandate, especially the order that both houses of a legislature should represent population to the exclusion of all other interests and factors.

This is why we have expressed the hope that lower courts would allow time for study of all the problems involved in each State's specific situation. And this is why we have granted the need in some States to take account of geographic peculiarities or unusual population concentrations, even while allocating seats within the general one-man-one-vote framework.

Yet, just because of this concern, we think the question raised by Senator DIRKSEN'S strategy is not whether it is justified by the need for caution, but whether it really serves that goal.

Is attention properly focused on the problems of reapportionment by attaching the delay proposal as a rider to a bill as irrelevant as the foreign aid authorization? Is full-scale deliberation encouraged by throwing a last-minute "monkey wrench" into the legislative works?

Experience with this kind of tactic—and it is a familiar one in legislative halls—compels a negative answer to both questions. The result of such maneuvers, in fact, is usually just the opposite of calm, reasoned, wise action.

It is for that very reason that the device is most often used to block rather than to promote constructive movement. And that is why Senator DIRKSEN'S aim seems to be protection of vested political interests rather than correction of the imbalance of power in legislative chambers.

[From the Akron Beacon Journal, Aug. 5, 1964[

STOPPING THE CLOCK

Amending the Constitution of the United States is not something which can be done overnight—or even within a year.

The usual process involves a favorable two-thirds vote by each House of Congress and then ratification by the legislatures of three-fourths (38) of the States. Since many legislatures meet only once in 2 years and all but one have two houses, ratification is a time-consuming process. Even in the case of a noncontroversial amendment, it usually takes 3 or 4 or more years.

It is understandable, therefore, that Representative WILLIAM M. MCCULLOCH, of Ohio, is afraid that his proposed amendment nullifying the Supreme Court's "one person, one vote" decision will be too late—if, indeed, it ever should be adopted.

MCCULLOCH and others in Congress want to write into the Constitution a provision that only one house in a State legislature must be apportioned on a population basis. This would mean that the other house, in the words of Chief Justice Warren, could represent trees, or cows, or acres.

Federal courts are already hewing to the new precedent set by the Supreme Court and, in some States legislatures are moving to correct the imbalance without waiting for court orders.

Fearful that the reform in representation may soon be accomplished, Representative MCCULLOCH has introduced an interim resolution which would abolish, for a period of 7 years, the power of either State or courts to decree the reapportionment of one house of a State legislature.

In a parallel move, Senator DIRKSEN yesterday pushed through the Senate Judiciary Committee a bill to halt Court orders for reapportionment until, in each case, a State legislature has held two regular sessions.

In other words, this would give 2 to 4 years for legislatures to act on the proposed constitutional amendment, while keeping the present apportionment in status quo.

It seems to us highly questionable whether the constitutional interpretations of the Supreme Court can be nullified or delayed by a mere act of Congress.

To be sure, the Constitution may be amended, but can Congress overrule the Court while the amendment process goes on?

MCCULLOCH'S resolution, which goes further than DIRKSEN'S bill, would even tell the State legislatures that they couldn't proceed with reapportionment.

Isn't that a direct contradiction of all that he and other States righters have been screaming about? They say they don't want any interference with the right of the States to set up their legislative apportionment in their own way. And now MCCULLOCH would have Congress tell them they can't give fair representation.

The U.S. Supreme Court ruled on this subject only after it became apparent that citizens had no other recourse against legislatures which neglected or refused to apportion representation on a fair basis.

Under prodding, many of the legislatures, including Ohio's, are now facing their responsibilities.

Is the clock now to be turned back, so that all the inequities of unequal representation can be perpetuated? That's the purpose of DIRKSEN'S and MCCULLOCH'S last-ditch fight to keep the status quo.

Mr. YOUNG of Ohio. Mr. President, the editorial in the Cleveland Press, which is a Scripps-Howard newspaper, the first of that great chain of newspapers, with a circulation of more than 350,000 states:

Congressman ROBERT TAFT a big-city Republican (Cincinnati), cannot be allowed to go unchallenged on his statements Thursday regarding Ohio apportionment.

TAFT denied that Ohio's Legislature was dominated by rural elements. He said he knew because he had served there for 6 years.

How could the Congressman have served for that long and not know: That 28.4 percent of Ohio's population has 50.7 percent (a majority) of the regular house seats in Columbus? Or, to put it another way—

That the 68 smallest counties, population 2,760,608, has 68 regular representatives—while the 20 largest counties, population 6,945,789, have only 66 seats? And also—

That the seven largest counties has 51.8 percent of Ohio's population and only 35.8 percent of the regular house seats?

The editorial continues, explaining that:

TAFT was testifying for a constitutional amendment which would stymie reapportionment of Ohio's House, ordered by the U.S. Supreme Court.

In supporting this amendment, Congressman TAFT said he feared the rural counties of southern Ohio would be underrepresented if population were the sole consideration for legislative seats.

What does TAFT think of the plight of underrepresented city dwellers in Cuyahoga and Lake Counties, to name only a couple?

Would be rather represent wornout coal mines and pine trees or people?

The Toledo Blade, which is one of the great newspapers of this country, stated:

As the Senate continued to wrestle over Senator EVERETT DIRKSEN'S effort to postpone application of the Supreme Court's State reapportionment rulings, some commentators began to look beyond his tactics to find merit in his goal.

Columnist Walter Lippmann, for instance, declared in last Tuesday's Blade that there is a great deal to be said in favor of taking a breather in the reapportionment battles. In brief, his argument was: So drastic a

change in our political structure as the realinement of representative power is a proper subject for deliberation and debate. * * *

Consequently, Mr. Lippmann, who is certainly one of the most respected columnists in this country—

found these advantages in delay of such overriding importance as to excuse Senator DIRKSEN'S technique, which the columnist conceded is "a bit awkward and rather inconvenient."

We, too, can see the value in carefully weighing the full potential impact of the Court's mandate, especially the order that both houses of a legislature should represent population to the exclusion of all other interests and factors.

This is why we have expressed the hope that lower courts would allow time for study of all the problems involved in each State's specific situation. And this is why we have granted the need in some States to take account of geographic peculiarities or unusual population concentrations, even while allocating seats within the general one-man-one-vote framework.

That is a perfectly logical statement. The situation in some States—Alaska, for example—might be unique. Undoubtedly the situation is different in that new State. Perhaps there is good reason to have every section represented. However, it might be a reason that would not apply to a State such as Ohio, with a population of 10 million in a compact area, as contrasted with a huge State such as Alaska.

The columnist is certainly accurate in his statement that time should be given in which to determine the factors involved in every State in the Union.

The editorial continues:

Yet just because of this concern, we think the question raised by Senator DIRKSEN'S strategy is not whether it is justified by the need for caution, but whether it really serves that goal.

Is attention properly focused on the problems of reapportionment by attaching the delay proposal as a rider to a bill as irrelevant as the foreign aid authorization? Is full-scale deliberation encouraged by throwing a last-minute monkey wrench into the legislative works?

Experience with this kind of tactic—and it is a familiar one in legislative halls—compels a negative answer to both questions. The result of such maneuvers, in fact, is usually just the opposite of calm, reasoned, wise action.

It is for that very reason that the device is most often used to block rather than to promote constructive movement. And that is why Senator DIRKSEN'S aim seems to be protection of vested political interests rather than correction of the imbalance of power in legislative chambers.

We in the Senate should be vigilant to prevent any disturbance in the delicate relationship between the three coordinate and equal branches of our Government—the legislative, executive, and judicial.

The third editorial to which I referred appeared in the Akron Beacon Journal under the caption "Stopping the Clock." I also call this editorial to the attention of my colleagues as an outstanding editorial printed in one of the great newspapers of my State.

The editorial reads:

[From the Akron Beacon Journal, Aug. 5, 1964]

STOPPING THE CLOCK

Amending the Constitution of the United States is not something which can be done overnight—or even within a year.

The usual process involves a favorable two-thirds vote by each House of Congress and then ratification by the legislatures of three-fourths (38) of the States. Since many legislatures meet only once in 2 years and all but one have two houses, ratification is a time-consuming process. Even in the case of a noncontroversial amendment, it usually takes 3 or 4 or more years.

It is understandable, therefore, that Representative WILLIAM M. MCCULLOCH, of Ohio, is afraid that his proposed amendment nullifying the Supreme Court's "one-person, one-vote" decision will be too late—if, indeed, it ever should be adopted.

MCCULLOCH and others in Congress want to write into the Constitution a provision that only one house in a State legislature must be apportioned on a population basis. This would mean that the other house, in the words of Chief Justice Warren, could represent trees, or cows, or acres.

That could be the effect if the cloture motion should be agreed to, and this measure were passed.

The editorial continues:

Federal courts are already hewing to the new precedent set by the Supreme Court and, in some States, legislatures are moving to correct the imbalance without waiting for court orders.

Fearful that the reform in representation may soon be accomplished, Representative MCCULLOCH has introduced an interim resolution which would abolish, for a period of 7 years, the power of either State or courts to decree the reapportionment of one house of a State legislature.

In a parallel move, Senator DIRKSEN yesterday pushed through the Senate Judiciary Committee a bill to halt court orders for reapportionment until, in each case, a State legislature has held two regular sessions.

In other words, this would give 2 to 4 years for legislatures to act on the proopsed constitutional amendment, while keeping the present apportionment in status quo.

It seems to us highly questionable whether the constitutional interpretations of the Supreme Court can be nullified or delayed by a mere act of Congress.

To be sure, the Constitution may be amended, but can Congress overrule the Court while the amendment process goes on?

MCCULLOCH'S resolution, which goes further than DIRKSEN'S bill, would even tell the State legislatures that they couldn't proceed with reapportionment.

Isn't that a direct contradiction of all that he and other States righters have been screaming about? They say they don't want any interference with the right of the States to set up their legislative apportionment in their own way. And now MCCULLOCH would have Congress tell them they can't give fair representation.

The U.S. Supreme Court ruled on this subject only after it became apparent that citizens had no other recourse against legislatures which neglected or refused to apportion representation on a fair basis.

Under prodding, many of the legislatures, including Ohio's, are now facing their responsibilities.

Is the clock now to be turned back, so that all the inequities of unequal representation can be perpetuated? That's the purpose of DIRKSEN'S and MCCULLOCH'S last-ditch fight to keep the status quo.

We in this Nation are proud that we have three coordinate branches of our Government—the legislative, executive, and the judicial. The pending amendment, if enacted, would destroy that equality which our Founding Fathers proposed. I hope that the pending amendment will be defeated.

I strongly urge against taking any precipitate action on the measure until it can be considered in a deliberative manner, in a calmer atmosphere, after the new Congress convenes next January.

As a U.S. Senator, representing the sovereign State of Ohio, I shall vote against the motion to close debate on this matter. I feel that we should put this aside altogether, not seek to have it adopted during this session of the Congress, and immediately go on with business that we should attend to; and then we should adjourn sine die.

Mr. METCALF. Mr. President, will the Senator yield?

Mr. YOUNG of Ohio. I yield.

Mr. METCALF. I have heard the excellent presentation made by the Senator from Ohio. The Senator has analyzed the so-called Dirksen amendment as to its effect on his own State. He has made an excellent presentation for a continuation of the debate until another Congress convenes and we can analyze, work on, and hear evidence about a proposed constitutional amendment, which is the way to approach the subject.

Has the Senator from Ohio completed his remarks?

Mr. YOUNG of Ohio. Yes; I yield the floor.

Mr. METCALF. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. METCALF. As I understand, by unanimous consent the Senator from West Virginia [Mr. RANDOLPH] yielded the floor to the Senator from Ohio [Mr. YOUNG], and then the Senator from Ohio [Mr. YOUNG] yielded to the junior Senator from Montana.

The PRESIDING OFFICER. The Senator is correct.

Mr. METCALF. At the conclusion of my remarks, will the Senator from West Virginia again have the floor?

The PRESIDING OFFICER. The Senator is correct.

Mr. METCALF. I thank the Chair.

Mr. President, I wish to address myself briefly to the same proposal about which the Senator from Ohio spoke, namely, the proposed amendment relative to reapportionment.

As a preface and in order to demonstrate objectiveness on this question I will analyze, as best I can, how the reapportionment provision will apply in Montana. This is an anniversary year in Montana, we are celebrating our centennial as a territory, and our 75th year as a State. The Organic Act of 1864 served as the Montana Constitution for the first 25 years. Section 4 of that Act provided as follows:

4. *And be it further enacted,* That the legislative power and authority of the said

territory shall be vested in the Governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of seven members having the qualifications of voters, as hereinafter prescribed, whose term of office shall continue two years. The house of representatives shall, at its first session, consist of thirteen members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue one year. The number of representatives may be increased by the legislative assembly, from time to time, to twenty-six, in proportion to the increase of qualified voters; and the council, in like manner, to thirteen. An apportionment shall be made, as nearly equal as practicable, among the several counties or districts for the election of the council and representatives, giving to each section of the territory representation in the ratio of its qualified voters as nearly as may be. And the members of the council and of the house of representatives shall reside in, and be inhabitants of, the district, or county, or counties for which they may be elected, respectively.

Congress in enacting that law apparently intended that the council and the house of representatives should be apportioned "as nearly equal as practicable" on the basis of population.

When Montana became a State and adopted its Constitution, it changed this concept of equal apportionment for both houses to one that is contained in the following provisions:

ARTICLE VI

SEC. 2. The legislative assembly shall provide by law for an enumeration of the inhabitants of the State in the year 1895, and every tenth year thereafter; and at the session next following such enumeration, and also at the session next following an enumeration made by the authority of the United States, shall revise, and adjust the apportionment for representatives on the basis of such enumeration according to ratios to be fixed by law.

SEC. 3. Representative districts may be altered from time to time as public convenience may require. When a representative district shall be composed of two or more counties, they shall be contiguous, and the districts as compact as may be. No county shall be divided in the formation of representative districts.

SEC. 4. Whenever new counties are created, each of said counties shall be entitled to one Senator, but in no case shall a senatorial district consist of more than one county.

The first Governor of Montana, Joseph K. Toole, was a delegate to the Constitutional Convention and he argued eloquently and fought long and hard against the proposition that each county would be entitled to one senator "and no more."

Governor Toole, more than three-fourths of a century ago, in a statement that has a prophetic ring to it, said:

This section is inherently wrong and does not meet the requirements of the Constitution of the United States which guarantees to every State a republican form of government. The counties in Montana, whether they contain 200 or 200,000 inhabitants are all placed on equal footing. What I understand to be meant by a republican form of government is a government where sovereignty is confided to and immediately exercised by the popular will.

Governor Toole suggested that it was appropriate and desirable for each county to have at least one senator in order that local interests have an expression but the limitation of one senator to each county was strenuously resisted on the same grounds as the Supreme Court of the United States laid down in Reynolds against Sims.

Mr. Arthur J. Craven, another member of the Montana Constitutional Convention, made a speech that sounds as if it came directly out of the decision of the Supreme Court 75 years later. He said, that the idea of one senator, and no more than one senator, for each county was "equivalent to saying, Go over all this broad domain of ours and let the rocks and the grasses and the squirrels and the cattle have representation instead of men and women—the most preposterous idea, I think, that has ever been seriously considered by a parliamentary assembly."

But the convention did not go along with these ideas. The spokesmen for equal representation were 75 years ahead of their time. Instead, the provisions above quoted were adopted and approved by Congress in the Enabling Act.

At the time the constitutional convention met in 1889 there were about 130,000 people in Montana territory. Half of these lived in three counties, Silver Bow, Deer Lodge, and Lewis and Clark, that are the mining counties of Montana. The cities of Butte, Anaconda, and Helena controlled the territorial legislature, and the smaller counties—smaller in population—had come to resent this tricounty control. It was the mining counties against the ranching and farming economy of the rest of the State.

It must also be remembered that in 1889 Montana was a State of the old frontier. Even the best roads were dirt, and most of them were impassable in inclement weather. Horses and buggies and wagon trains made the already great distances seem even greater. County seats were small, and in remote areas there was more loyalty to the county and its immediate region than to the rest of the vast territory.

Therefore, the original constitutional convention for Montana was a battleground of the same questions as have been recently decided by the U.S. Supreme Court. Delegates from the farming counties, rural districts that were sparsely populated, fought to contain the influence of the richer and more populous mining counties. The plan for the representation of rocks, grass, squirrels and cattle instead of men and women, won.

During the course of the debate an amendment was offered to provide for "at least one senator per county." And when this was defeated, and the original proposal that there be not more than one senator per county was adopted, one of the newspapers from outside the three most populous counties commented:

We are pleased to state that the swinishness of the populous counties has met with a check.

There is no doubt that the Montana Constitutional Convention knew what it was doing when it apportioned the senate in the way it did. Although the debate did mention the Federal analogy, the members differentiated it and did not accept it as the basis for the apportionment finally arrived at. The apportionment of the senate was a deliberate effort on the part of rural and sparsely settled counties to wrest control from the three richest and most populous counties. In doing so, one of the greatest of Montana's early Governors warned the members that they were violating the Constitution of the United States.

In 1889 there were 16 counties in Montana, by 1925 40 new counties had been created and the Montana Senate consisted of 56 members. Some of these counties were needed. In some eastern Montana counties the county seat was as much as 200 miles away over impassable and nonexistent roads. But county splitting, and the establishment of county seats became such a popular sport during the homesteading years that many new counties of small population were formed. These counties have not realized the optimistic hopes of their founders. The dreams of the county busters disappeared in the farm depression of the twenties. From 1901 on, the legislature provided that each new county would be entitled to at least one representative. This, of course, upset the balance in the house of representatives so that both branches of the Montana Legislature became malapportioned.

I can personally testify to such disproportionment, because I served as a representative to the Montana Legislature in 1937, when the house of representatives consisted of 102 members, taxing even the accommodations of the house chamber.

In 1961 an apportionment act established the ratio of population for representatives at 1 per 8,500 or major fraction. This aggravated malapportionment in that branch of the legislature. An example is Ravalli County which I represented in 1937. There are 12,341 people. For years it had had two representatives. But in 1963 it lost its second representative because it fell short of the 8,500 plus a major fraction—4,251—or a total of 12,751 for a second representative—410 people short. Yet in the State of Montana there are 17 counties with less than the 3,841 people by which Ravalli County exceeded the 8,500 figure.

Today the Senate in Montana is composed of 56 members, one from each of the 56 counties. In the 1960 election the smallest county—Petroleum—had 535 registered voters. The most populous county—Yellowstone—had 36,407 registered voters. Therefore, the elector in Petroleum County has a voting power in the State senate of over 70 times the voting power of an elector in Yellowstone County. Petroleum County with 535 registered voters and Ravalli County with 6,459 voters have the same representation in the house of representatives; one vote.

Now, what will a realinement and a reapportionment do to the political composition of the house of representatives and the State senate if the decision of the U.S. Supreme Court is followed? This is a difficult question, and at the present time I have not the local election returns that will permit an accurate

analysis of the effect. In a recent article in the Montana Business Quarterly, a publication of the School of Business Administration of Montana State University, Mr. Douglas C. Chaffey published a proposal for "Legislative Apportionment in Montana" that would comply with the decision of the U.S. Supreme Court. Mr. Chaffey is a native of Montana, a graduate of the business school, and is now studying for his doctorate at the University of Wisconsin.

Mr. Chaffey has proposed that districts of approximately 7,000 be created for the house of representatives in the Montana Legislature which would retain the present membership of 94. For reapportionment of the State senate a constitutional amendment would be necessary to eliminate the provision that each county was entitled to one senator. He creates senatorial districts of more than one county based on population. Using a ratio of 20,000 persons for each senator he has drawn senatorial districts that will substantially change the political complexion of the Montana Legislature.

It is admittedly difficult to extrapolate the present membership of the State senate upon a new system of elections. For example some of the leading and most influential State senators are from the rural counties. Given their prestige and their public acceptance these men would be elected from any larger senatorial district regardless of party affiliation.

But merely for the purpose of demonstrating the effect of a reapportionment on the basis of population as recommended by Mr. Chaffey, I have worked out what might have happened in 1960 had the vote for state senator been cast in the same proportion as the vote for Governor, for President, and for U.S. Senator in the 1960 election.

Montana now has 35 Democratic State senators and 21 Republicans. The proposal made by Mr. Chaffey would create 20 senatorial districts in Montana with a total of 33 elected senators. The table for the population breakdown and the number of State senators for each district is as follows.

I ask unanimous consent that it be included in the CONGRESSIONAL RECORD at this point as a part of my remarks.

There being no objection, the table was ordered to be printed in the RECORD, as follows:

A proposed apportionment of the Montana Senate

Senatorial district	Population	Senators
1. Yellowstone, Carbon	87,333	4
2. Cascade	73,418	4
3. Missoula, Mineral, Ravalli	60,041	3
4. Silver Bow, Jefferson	50,751	3
5. Flathead, Lincoln	45,502	2
6. Lewis and Clark, Meagher, Broadwater	33,426	2
7. Glacier, Pondera, Toole, Teton	32,448	2
8. Deer Lodge, Granite, Powell	28,656	1
9. Hill, Chouteau, Liberty, Blaine	29,364	1
10. Wheatland, Mussellshell, Fergus, Golden Valley, Judith Basin	27,024	1
11. Gallatin	26,045	1
12. Phillips, Valley	23,107	1
13. Custer, Fallon, Carter, Powder River	22,192	1
14. Daniels, Sheridan, Roosevelt	22,043	1
15. Dawson, Garfield, McCone, Prairie, Wibaux	21,632	1
16. Park, Stillwater, Sweet Grass	21,984	1
17. Lake, Sanders	19,984	1
18. Big Horn, Treasure, Rosebud	17,539	1
19. Beaverhead, Madison	12,405	1
20. Richland	10,541	1
Total (20 districts)	674,767	33

Mr. METCALF. Using Mr. Chaffey's proposal and the Democratic and Republican vote for Governor in 1960 as a guide for the probable vote for Democratic and Republican State senators in these districts, it would consist of 27 Republicans and 6 Democrats. If the 1960 returns in the presidential contest between John F. Kennedy and Richard M. Nixon be used as a guide, it would be closer, there would be 20 Republican State senators and 13 Democratic senators.

Richard Nixon carried the State for President by about 7,000 votes; former Gov. Donald G. Nutter was elected Governor by a plurality of 28,500 votes. On the other hand, I was elected U.S. Senator in the same statewide election by 4,000. Using the election returns in the U.S. Senate race as a guide, the margin would change and the State senate would consist of 18 Democrtas and 15 Republicans.

The trial courts of record in Montana are the district courts. In order to attempt to balance the work of the courts, the counties have long been combined into judicial districts. The table for the combination of counties in each judicial district and the number of judges therein is contained in a table which I ask unanimous consent to have included in the CONGRESSIONAL RECORD at this point.

There being no objection, the table was ordered to be printed in the RECORD, as follows:

Judicial district	Counties	Population	Number of judges
1st	Broadwater and Lewis and Clark.	30,810	2
2d	Silver Bow	46,454	2
3d	Deer Lodge, Granite, and Powell.	28,656	1
4th	Missoula, Mineral Lake, Ravalli, and Sanders.	80,025	3
5th	Beaverhead, Jefferson, and Madison.	17,287	1
6th	Park and Sweet Grass	16,458	1
7th	Dawson, McCone, Richland, and Wibaux.	27,837	1
8th	Cascade and Chouteau	80,766	3
9th	Teton, Pondera, Toole, and Glacier.	34,417	1
10th	Fergus, Judith Basin, and Petroleum.	17,997	1
11th	Flathead and Lincoln	45,502	2
12th	Liberty, Hill, and Blaine	29,368	1
13th	Yellowstone, Big Horn Carbon, Stillwater, and Treasure.	104,211	3
14th	Meagher, Wheatland, Golden Valley, and Mussellshell.	11,733	1
15th	Roosevelt, Daniels, and Sheridan	21,944	1
16th	Custer, Carter, Fallon, Prairie, Powder River, Garfield, and Rosebud	32,661	2
17th	Phillips and Valley	23,107	1
18th	Gallatin	26,045	1

Mr. METCALF. There are 28 district judges; and again using the 1960 election results for Governor, President, and U.S. Senator as a guide and assuming that there would be as many State senators as there are now district judges, the results would come out about the same as in the above proposal. If the election returns for Governor were transferred to the State senator race, the Montana State senate would not consist of 35 Democrats and 21 Republicans as now organized, but would be 23 Republicans and 5 Democrats. Using the presidential election returns, the ratio would be 18 Republicans and 10 Democrats; and again using the returns in my contest in 1960, there would be a slight Democratic advantage of 16 Democrats and 12 Republicans.

It is obvious from these figures that any reapportionment of the Montana State senate would work to the advantage of the Republican Party. There are outstanding and experienced and well-known men in each party whose personal following would change the values given above. But over the years and considering the whole State the ratio would probably work out to the advantage of the Republican Party.

An apportionment with districts such as are suggested by Mr. Chaffey however, does give a basis for practical malapportionment and misrepresentation in the same manner as I have earlier suggested. I mentioned the Fourth Judicial District where the large county of Missoula completely dominated the smaller surrounding counties. Another such example is the combination of Yellowstone County with a population of 79,016 and Carbon County with a population of 8,317 into one senatorial district to elect 4 State senators. Actually the entire number would come from Yellowstone County and unless there were an exceptional and well-known individual from Carbon County that area and its special interests would never be represented. This is why I believe that we should have hearings on a constitutional amendment to permit one house of a bicameral legislature to be represented by other than a population ratio. On the other hand, there may be serious and overriding political reasons that should prohibit such a division of legislative authority and the whole question should be threshed out in thorough and comprehensive hearings before the legislative committees of the Congress who are skilled in these political questions and not come to us as an amendment to a foreign aid authorization bill.

Mr. President, I have shown what would probably happen in the State of Montana if there were a reopportionment of the State senate. It would work to the advantage of the Republican Party.

I have demonstrated this because I still believe that we should oppose the present amendment and vote against the present proposal to invoke cloture on next Thursday, and vote for a constitutional amendment, and for comprehensive and thorough hearings on such an amendment, to properly and adequately appraise the political aspects of the situation.

According to Madison's reports of the debates in the Constitutional Convention, on June 11 the Chairman, Benjamin Franklin said:

It has given me great pleasure to observe that till this point, the proportion of representation, came before us, our debates were carried on with great coolness and temper. If anything of a contrary kind, has on this occasion appeared, I hope that it will not be repeated; for we are sent here to consult, not to contend, with each other; and declarations of a fixed opinion, and of determined resolution, never to change it, neither enlighten nor convince us. Positiveness and warmth on one side, naturally beget their like on the other; and tend to create and augment discord and division in a great concern, wherein harmony and union are extremely necessary to give weight to our councils, and render them effectual in promoting and securing the common good.

I must own that I was originally of the opinion that it would be better if every Member of Congress, or our National Council, were to consider himself rather as a representative of the whole, than as an agent for the interests of a particular State; in which case the proportion of Members for each State would be of less consequence, and it would not be very material that they voted by States or individually. But I find this not to be expected. I now think the number of Representatives should bear some proportion of the number of the represented.

Franklin was speaking on the issue of suffrage in the proposed National Legislature which became Congress in the final draft of the Constitution. But I find this quotation appropriate at this time because this is the first occasion since I became the junior Senator from Montana that I have disagreed so strongly from the position taken by my senior colleague. Because of my affection and regard for him, and my respect for his wisdom and leadership I hope that I can today set forth my differences with him on this issue without engendering the warmth that Franklin sought to avoid. At the same time I am convinced that in justice to my constituents and my esteem for my colleague, the majority leader, that I set forth the reasons why I oppose the amendment he has cosponsored with the minority leader, the distinguished Senator from Illinois. As Franklin said:

I now think the number of representatives should bear some proportion to the number of the represented.

I must confess when the decision in *Baker* v. *Carr*, 369 U.S. 186, was handed down in March of last year, I did not read the case, I read about the decision in the newspapers and periodicals and actually arrived at no conclusion about it, other than to say that it was about time that something was done about malapportionment in some of the congressional districts. Nor did I read the other decisions that followed until the last few weeks when this amendment was first advanced. I have now read and studied to the best of my ability not only Baker against Carr, but Reynolds against Sims; WMCA, Inc. against Lomenzo; Roman against Sincock; Maryland Committee for Fair Representation against Tawes; Lucas against the Forty-fourth General Assembly of Colorado; Davis against Mann, all relating to various phases of the reapportionment question. In addition, I have reread some of the Federalist Papers, several Law Review articles, and the minutes of the procedures of the Constitutional Convention. After such, by no means exhaustive, research I have come to the conclusion that I agree with Reynolds against Sims:

We hold that, as a basic constitutional standard, the equal protection clause requires that the seats in both houses of a bicameral State legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for State legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the State.

Again later on the Court says:

By holding that as a Federal constitutional requisite both houses of a State legislature must be apportioned on a population basis, we mean that the equal protection clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature as nearly of equal population as is practicable.

These declarations are reinforced by statements made by our Founding Fathers. For example, James Wilson, a delegate to the 1887 Constitutional Convention said:

The doctrine of representation is this—first the representative ought to speak the language of his constituents, and secondly that his language or vote shall have the same influence as though the constituents gave it.

And Jefferson said:

Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation, because the prejudices themselves cannot be justified.

The Declaration of Independence stresses the democratic ideals of equality and the right of representation. The Northwest Ordinance of 1887 provided that all the people would be forever entitled to representation in the legislature in proportion to their members.

But if one of the basic assumptions of democratic rule is the one man, one vote concept so that all citizens will have approximately the same political voting weight in both houses of a bicameral State legislature, I am not certain that sound political doctrine requires such an apportionment. In his dissenting opinion in Reynolds against Sims, Mr. Justice Harlan enumerates some of the factors that have been used as criteria for establishing electoral districts in one body of a bicameral legislature other than population. They are as follows:

First, history; second, economics of other sorts of group interests; third, area; fourth, geographical considerations; fifth, a desire "to insure effective representation for sparsely settled areas"; sixth, "availability of access of citizens to their representatives"; seventh, therories of bicameralism (except those approved by the Court); eighth, occupation; ninth, "an attempt to balance urban and rural power"; tenth, the preference of a majority of voters in the State.

I find merit in Justice Harlan's argument that "legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where the electors live."

For example, in Montana, where I grew up, the Fourth Judicial District, which is the district for original trial of cases under the jurisdiction of the first court of record, was composed of five counties: Missoula, Mineral, Lake, Ravalli, and Sanders. Missoula County had a voter registration of 22,000, and the combined registration of the outlying counties was 18,300. Time and again I have seen a lawyer from Mineral, or Sanders, or Ravalli, or Lake run for one of the two positions open for district judge and get a majority of the vote in all the outlying counties and still be defeated by the hometown candidates in Missoula. If the judicial district had been a senatorial electoral district, the electors of the outlying counties would have been more effectively disfranchised than residents of malapportioned districts. But this is a matter for a constitutional amendment, and the questions raised by the various criteria mentioned by Justice Harlan, and others, are questions that should be carefully explored in comprehensive congressional hearings and not be regarded as side issues to a foreign aid authorization bill in the closing days of a Congress.

The controversy in which we are engaged in reminiscent of the last days of the 85th Congress when I was a Member of the other body and several bills limiting the power of the Supreme Court were still pending. The House sent to the Senate such legislation as the notorious H.R. 3, which was a broad preemption bill, a bill modifying the Supreme Court's decision in the Mallory case, and a bill to limit Federal judicial review of State criminal trials by habeas corpus. This latter proposition has come under popular scrutiny as a result af the New Yorker magazine articles that have been issued as a book under the title of "Gideon's Trumpet."

By a curious coincidence the dates are almost identical. The then majority leader of the Senate, now President Johnson, wanted to adjourn sine die on August 23. The target date this year was August 22.

In that year Senator HUMPHREY and Senator DOUGLAS led the assault on the legislation, and when Congress adjourned a little group of Senators had defeated the congressional attack on the courts.

But that year the questions were a little different. For example, there was the preemption issue brought up, chiefly, by the decision of the Supreme Court in *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), in which the U.S. Supreme Court held that the Pennsylvania State sedition act was invalid because the Federal Government had preempted this area and the State no longer had any power.

H.R. 3 would have provided:

No act of Congress shall be construed as indicating an interest on the part of Congress to occupy the field in which such act operates to the exclusion of any State laws on the same subject matter unless such act contains an express provision to that effect, or unless there is a direct and positive conflict between such act and the State law so that the two

cannot be reconciled or consistently stand together.

A second section of the bill dwelt directly with Nelson case and provided that Federal antisubversion legislation could not prevent enforcement of State sedition statutes.

Section 1, if enacted, would have been a broad statutory declaration by Congress that it does not intend to preempt any field without a specific declaration of such an intent. The mischief of H.R. 3, of course, was that it was retroactive. But clearly such a declaration is within the power of the legislative branch.

Another decision was that of *Yates* v. *United States*, 354 U.S. 298, which involved the conviction of 14 Communists in California for violation of the Smith Act. This case did not question the constitutionality of the Smith Act, but it did consider statutory interpretation, judicial procedure, and evidence. The convictions of five defendants were reversed, and nine defendants were granted a new trial.

In the majority opinion of Yates, Justice Harlan relied on one of the oldest rules of statutory interpretation—that penal laws are to be strictly construed. This rule, as Chief Justice Marshall said in *U.S.* v. *Wiltberger*, 5 Wheat. 76, "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the Court, which is to define a crime, and ordain its punishment." The Court went on to interpret and construe the word "organize" in the Smith Act in a very narrow way that excluded the defendants before the bar. This decision was actually based on a desire, as stated above by Justice Harlan, to have the Court leave the question of legislating to the Congress, even though the decision was attacked as judicial legislating.

A third question that brought about the attack on the Supreme Court in the 85th Congress was the passport decision. The power to give the Secretary of State broad discretionary powers to deny passports dated back to the basic statute, passed in 1856, which provided:

> The Secretary of the State may grant and issue passports * * * under such rules as the President shall designate and prescribe.

In *Kent* v. *Dulles*, 375 U.S. 116 (1958), the Court held that the right to travel was an individual constitutional right, protected by the due process clause, that could not be infringed by vague and indefinite statutory implication. If the right was to be limited, a clear and specific statutory foundation had to be laid and these limitations had to be subject to the classic rules for delegation of legislative power to the executive.

I have dwelt upon these cases in some detail because I want to point out the essential difference between what is being attempted at this time and what the advocates of the bills to curb the Supreme Court were attempting in the 85th Congress.

Incidentally, on August 21, 1958, in a crucial vote the Senate recommitted the preemption bill by a vote of 41 to 40. Both authors of the present amendment and the then majority leader, and now President Johnson voted to recommit the bill. I ask unanimous consent that the rollcall on that vote be printed at this point in the RECORD.

There being no objection, the vote was ordered to be printed in the RECORD, as follows:

Yeas, 41: Aiken, Anderson, Beall, Bennett, Bible, Carroll, Case of New Jersey, Case of South Dakota, Chavez, Church, Clark, Cooper, Dirksen, Douglas, Green, Hayden, Hennings, Humphrey, Jackson, Javits, Johnson of Texas, Kefauver, Kennedy, Langer, Lausche, Magnuson, Malone, Mansfield, McNamara, Morse, Morton, Murray, Newberger, O'Mahoney, Pastore, Proxmire, Purtell, Saltonstall, Symington, Wiley, Yarborough.

Nays, 40: Barrett, Bridges, Butler, Byrd, Capehart, Cotton, Curtis, Dworshak, Eastland, Ellender, Ervin, Fulbright, Goldwater Gore, Hickenlooper, Hill, Hoblitzell, Jenner, Johnston of South Carolina, Jordan, Knowland, Kuchel, Long, Martin of Iowa, Martin of Pennsylvania, McClellan, Mundt, Potter, Revercomb, Robertson, Russell, Schoeppel, Smith of Maine, Sparkmen, Stennis, Talmadge, Thurmond, Thye, Watkins, Williams.

Not voting, 15: Allott, Bricker, Bush, Carlson, Flanders, Frear, Holland, Hruska, Ives, Kerr, Monroney, Payne, Smathers, Smith of New Jersey, Young.

Mr. METCALF. Mr. President, I have emphasized that in each of the categories mentioned the Supreme Court was interpreting statutes and defining statutory rights or limiting statutory restrictions that had been created by Congress.

The passport issue, the loyalty-security issue, the preemption issue—all turned upon the construction of legislative language, upon the application of classic rules for ascertaining legislative intent, upon basic considerations coming to us from the common law upon protecting from vague statutory language the rights of individuals charged with crimes. Such decisions are always within the purview of the Supreme Court; and when the Court misjudges legislative intent, misconstrues legislative language, or points out that the statute is indefinite or obscure, the legislature or Congress has the duty and obligation to examine the decision and correct the wrong legislative interpretation, or redefine the crime, or clarify the language.

But in the amendment offered by the majority and minority leaders, we are not only confronted with statutory interpretation and determination of legislative intent, but we have before us a basic constitutional issue. Justice Holmes once declared:

> If American law were to be represented by a single figure, skeptic or worshipper alike would agree without dispute that the figure could be one alone, and that one John Marshall.

Of course, the great decision of Chief Justice Marshall was that of Marbury against Madison, 1 Cranch. 137—1803. Marbury against Madison established the principle of the supremacy of the judiciary in constitutional matters. The authority of the U.S. Supreme Court to declare a statute unconstitutional was laid down, an authority that is now firmly established in American jurisprudence.

In the Dirksen amendment, as in the Tuck bill, we are not confronted by legislative interpretation, or by clarification of language that has been held to be vague or indefinite. We are faced with a series of decisions that hold that "one man, one vote" is a basic constitutional proposition for electors for the House of Representatives of the Congress, and equally for both houses of a bicameral State legislature. The majority leader has said that one purpose of his amendment is to gain some time for the legislatures to act. He says that he regrets that the Court did not mention "deliberate speed" with which the States could comply with the decision, as was mentioned in the school segregation cases. But a reading of Raynolds against Sims forcefully demonstrates that great flexibility is permitted by the Court, even more than a solitary mention of "deliberate speed."

In the statement of the case, the Court pointed out that the Alabama constitution required reapportionment immediately after each decennial census and yet, in spite of population changes, no such reapportionment had taken place since 1901. Here, then, is more than a half century of inaction; certainly this is not precipitous activity on the part of the Court. Throughout the opinion the Court has laid down flexible standards in language such as:

> By holding that as a Federal constitutional requisite both houses of a State legislature must be apportioned on a population basis, we mean that the equal protection clause requires that a State make an honest and good-faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize is is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

Again the legislative act:

> Would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to State legislative apportionment than in congressional redistricting.

Then the Court works out the technique of handling the cases, not making general rules but declaring:

> Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of State legislative apportionment.

It is just this case-by-case analysis as a judicial process that the Congress proposes to halt by the pending amendment.

I read from the case of Roman against Sincock:

> Our affirmance of the decision below is not meant to indiciate approval of the District Court's attempt to state in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population.[1] In

[1] The court below suggested that population-variance ratios smaller than 1½-to-1 would presumably comport with minimal constitutional requisites, while ratios in excess thereof would necessarily involve deviations from population-based apportionment too extreme to be constitutionally sustainable. See 215 F. Supp., at 190.

our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a State legislative apportionment scheme under the equal protection clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Mr. President, in Wesberry against Sanders, the Court held that congressional representation must be based on population as nearly as is practicable. There is also provision for flexibility insofar as the time is concerned. Reynolds against Sims says that limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportionment no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial periods, and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the equal protection clause as requiring daily, monthly, annual or biennial reapportionment so long as a State has a reasonably conceived plan for a periodic readjustment of legislative representation.

So, the real flexibility is in compliance with the decision of the Supreme Court. The rigidity that is deplored is in adopting the pending amendment that will stay all proceedings.

But the basic proposition through all the reapportionment cases is the constitutional right of the individual to have his vote count for just as much as any other individual's. This is the golden thread that runs through all the decisions. In Baker against Carr the Court said:

> We conclude that complainant's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and decision. The right asserted is within the reach of judicial protection under the 14th amendment.

Mr. PROXMIRE. Mr. President, will the Senator from Montana yield?

The PRESIDING OFFICER (Mr. McGOVERN in the chair.) Does the Senator from Montana yield to the Senator from Wisconsin?

Mr. METCALF. I am glad to yield to the Senator from Wisconsin.

Mr. PROXMIRE. The Senator's contion that, as he puts it, the golden thread consistently runs through the courts decisions, is that it is a constitutional right of each individual to have his vote count as every other individual vote; is that not correct?

Mr. METCALF. The Senator is correct. It is a basic, individual constitutional right, with which I agree. I believe that an examination of the Federalist Papers, the minutes of the original Constitutional Convention, and other documents of our Founding Fathers, will bear out that it was the original intention in both legislatures and in the House of Representatives that the one man-one vote principle should be a part of our republican form of government.

Mr. PROXMIRE. As I understand, then, what is most unfortunate and wrong about the Dirksen and the Tuck proposals is that they would have the Congress to intervene, after a Supreme Court decision, and suspend or overrule the action of the Supreme Court, which would in effect end judicial review as we have known it and would seriously weaken the division of powers; is that not correct?

Mr. METCALF. The Senator is quite correct. The Senator has anticipated an argument I am about to make further on in my address, that adoption of either the Tuck or the Dirksen proposal would seriously hamper the separability of power which is a basic consideration in our form of government.

Mr. PROXMIRE. If the Senator intends to develop that point a little later let me revert to an earlier point he made—one which has not received sufficient stress and discussion on the floor; namely, the timing of the action by the Supreme Court, whether the Supreme Court has demanded precipitate, sudden, instant response on the part of State legislatures, whether it has required them to apportion in an unreasonably short time, or whether, in the judgment of the Senator from Montana, who has been a judge himself and has had the opportunity to study these cases carefully, the Supreme Court has allowed adequate time in such cases, so that the State legislature would have an opportunity to act, with the will to do so, without serious inconvenience.

Mr. METCALF. I most certainly do. I believe that is a special point. As was pointed out in one case, it was 50 years since there had been reapportionment, so that there was no precipitate action on the part of the Supreme Court.

Mr. PROXMIRE. In what case?

Mr. METCALF. Reynolds against Sims.

Mr. PROXMIRE. Reynolds against Sims.

Mr. METCALF. Certainly, no case comes to the U.S. Supreme Court, to a district court, or to a circuit court, without someone bringing in the case. There must be some underlying action before the case can even be brought into court. As I have pointed out from these decisions, the Court points out that each of the States must have its rights, its liabilities, and its duties allowed upon a State-by-State and a case-by-case basis. Here, we are asked to pass general legislation at a late date in the Congress, and without any hearings, which would prohibit any action by any courts; whereas the Court says that we should not act too precipitately. We do not require mathematical precision. We do not require daily, monthly, yearly, or even decennial reapportionment.

But we require that as much as practicable be accomplished, that there be a reapportionment, so that as a practical matter the one man, one vote principle would be applied to State legislatures.

Mr. PROXMIRE. What the Court has tried to do is to apply this principle on an individual basis, depending on the merits of each case, and examining the merits carefully. The Court has tried to lay down rules of flexibility so that each State can adopt its own procedure in accordance with its own particular and peculiar problems—historical problems, and so forth. It is in a position to do that individually because of the nature of the judicial system. But Congress would substitute a blanket order which, in the case of Michigan, Wisconsin, and many other States, could result in a chaotic situation.

Mr. METCALF. I believe that is true in the case of Illinois.

Mr. PROXMIRE. Yes. Whereas, Congress might provide a remedy in one or two other States, the Supreme Court is trying to study each case individually and decide it on a fundamental basis as it decided the Reynolds against Simms case, as to how the various States can comply with that order and do it most conveniently and most appropriately, but eventually.

Mr. METCALF. That is correct. It decided it on the basic facts that are presented to the district court in adversary procedure for that purpose. It admonished each of the district courts that might hear the case that there is no hard-and-fast rule, that they must do the best practical thing under the circumstances. There is the real flexibility, the genuine flexibility that is in the Supreme Court decision, rather than the rigidity of the amendment, which states, in effect, "You shall cease the hearing of all cases until 1966."

Mr. PROXMIRE. I thank the Senator.

Mr. METCALF. I spoke about the right of the individual to have his vote count for as much as the vote of any other individual. I stated that the vote was a basic, individual, constitutional right.

In Reynolds against Simms, the Court stated:

> We hold that, as a basic constitutional standard, the equal protection clause requires that the seats in both houses of a bicameral State legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for State legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

And later the Court said:

> Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

I enumerate these cases and emphasize the fact that we are talking about what the Court has said in all the cases about the basic, individual, constitutional right. I seek to differentiate what was done in the 85th Congress when a group—some of the same group who are opposing this amendment and the minority and the majority leader—now the President of the United States—and others made a strong fight to prevent Congress from overruling the Supreme Court in cases where no basic, constitutional right was involved. It involved merely a case of statutory interpretation or construction of legislative language, or the definition

of a crime. That is a thing on which the Court frequently conflicts with the legislature, and the legislature in turn says, "This is what we meant. This is what our real interpretation is."

Then, once the legislature has spoken, the Court continues and follows through with the construction of the language, as the amended bill provides.

But we are dealing here with a basic, individual, constitutional right. We are not dealing with the definition of a crime, the construction of statutory language, or the interpretation of the Constitution. We are dealing with something that goes further back than that. We are dealing with something that is as substantial as the right of a trial by jury or the right of freedom of speech.

I think of an analogy. Suppose we were to say that the right of women to vote interferes with the election of some of our officers, and someone suggests the introduction of a constitutional amendment in the next Congress, but that until then we should pass a law that women would not have the right to vote. That would be a clear violation of the 19th amendment. Of course, we could not do that. Suppose we were to say that because of the unfortunate situation in Mississippi, Alabama, and Georgia, we are convinced that the people in Mississippi, Alabama, and Georgia do not have a fair jury trial, and until the civil rights situation has cleared up, for a couple of years, we would set aside the right of trial by jury in that situation, and there would be no more jury trials.

Clearly, such an act would be unconstitutional, whether we were to do it for a day, a week, or as the Tuck bill provides, set aside a constitutional right forever. That is the difference between what happened in the 85th Congress and what is being attempted here today.

Mr. PROXMIRE. Is it not true that, pursuing the same analogies that the Senator from Montana did, Congress might in a time of national emergency and hysteria suspend the right of free speech, the right of worship, which are the most fundamental rights that have been written into the first amendment of the Constitution, which, in the judgment of many Americans, distinguishes this country as the bastion of liberty more than any other phase of our entire Government. The right of an equal vote in the State legislature is just as fundamental in principle on the basis of the Supreme Court decision as any of the other rights which the people of America have been willing to fight and die for.

Mr. METCALF. We could paraphrase the Dirksen amendment and say, "Instead of the one-man, one-vote suspension and instead of saying that no court can have jurisdiction to entertain any case brought under the provisions of the Bill of Rights, we will suspend the entire Bill of Rights until 1966," or, as the Tuck bill provides, suspend it forever. We are now talking about constitutional rights. This is not a statutory decision. This is not construction of language. This is not a tempering of words. The Court has held in the cases that I have already enumerated, and that I shall read later, that this is a basic, individual, constitutional right.

Mr. PROXMIRE. The distinguished Senator from Montana is making a highly significant speech. I hope that our colleagues will have an opportunity to study it in the RECORD. This issue goes to the very heart of our objections to the Dirksen amendment.

Some of us feel very deeply about one man, one vote. Some of us feel very strongly about the inequity this proposal would work against many of our urban citizens. And, while that is very important, it seems to me that it is not in the same class as an objection as the fundamental principle that the Senator from Montana is stressing now, that our very constitutional rights are threatened if we agree to the Dirksen amendment, which seeks to abridge, postpone, or destroy a ruling of the Supreme Court by an act of Congress.

I believe that the Senator from Montana is presenting this argument in an unanswerable way. I have not heard a single word of argument to refute what the Senator has said so far.

It would be very interesting if those who support the Dirksen amendment could find any way to meet that argument. They have talked about inconvenience to State legislatures. They have talked about an analogy with the U.S. Senate. They have talked about how the farm groups and rural groups need greater representation. I have studied the CONGRESSIONAL RECORD very carefully, as has the Senator from Montana. Proponents of the Dirksen amendment have not begun to answer the fundamental issue which is at stake, namely, Shall the Supreme Court be in a position to protect and affirm constitutional rights, or shall it not? That is the question which is at stake. The Senator from Montana is making the most significant speech on this subject to date.

Mr. METCALF. I thank the Senator from Wisconsin for his remarks. He has pointed out that this is the most dangerous constitutional crisis that our Nation has ever faced, because if Congress can set aside a basic constitutional right such as one-man, one-vote has been declared to be, Congress can set aside any other part of the Constitution, and we would see the end of our constitutional form of government. It alarms me and concerns me that so many Senators who continually talk about the Constitution and about constitutional government have signed the cloture motion, have spoken in defense of the postponement of constitutional rights, and have wished to repeal decision after decision, going back to the great decision of Chief Justice Marshall in Marbury against Madison.

In Davis against Mann, a case coming to the U.S. Supreme Court from Virginia, the majority opinion summarized the holding of Reynolds against Sims as follows:

> In *Reynolds* v. *Sims*, decided also this date, we held that the equal-protection clause requires that seats in both houses of a bicameral State legislature must be apportioned substantially on a population basis. Neither of the houses of the Virginia General Assembly, under the 1962 statutory provisions here attacked, is apportioned sufficiently on a population basis to be constitutionally sustainable.

In Lucas against The Forty-fourth General Assembly of the State of Colorado, the question was on the apportionment of the Colorado State senate as approved by a majority vote of the electorate of Colorado in a referendum submitted for that purpose. The Court examined the apportionment provided and concluded:

> That the fact that a challenged legislative apportionment plan was approved by the electorate is without Federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the equal-protection clause.

The Court said:

> Apportionment of senate seats * * * clearly involves departures from population-based representation too extreme to be constitutionally permissible.

In WMCA against Lomenzo, a New York case, the Court said:

> Neither house of the New York Legislature, under the State constitutional formulas and the implementing statutory provisions here attacked, is presently or, when reapportioned on the basis of 1960 census figures, will be apportioned sufficiently on a population basis to be constitutionally sustainable.

So here we are dealing with a vastly different proposition than that which confronted us in the 85th Congress. Here is a constitutional right which the proposed amendment will set aside or temporarily stay for a period, as I have discussed in the colloquy just held with the Senator from Wisconsin [Mr. PROXMIRE].

If there is one thing that Marbury against Madison decided it is that the legislative branch cannot destroy the individual constitutional rights of citizens. This proposition is basic in the law and is the foundation for the declaration in Wesberry against Saners that "laws which debase a citizen's right to vote" come under this power. Not only is it hornbook law that the Supreme Court is the constitutional guardian against congressional encroachments upon the constitutional rights of the citizen, but it is equally as well established that Federal rights under the U.S. Constitution may be protected from violation by acts of the States. This has been statutory law since the original Judiciary Act in the First Congress. It is basic case law since Marbury against Madison. This is the holding in the landmark cases of *Fletcher* v. *Peck* (6 Cr. 807), and *McCullough* v. *Maryland* (4 Wh. 316). One of the functions of the U.S. Supreme Court is to pass on the constitutionality of State laws and the Constitution itself establishes the U.S. Supreme Court as the final tribunal for constitutional adjudication. For example, in *Cooper* v. *Aaron* (358 U.S. 1, (1958)), which was a case involving interposition, the Court said that Marbury against Madison had laid down the duty "to say what the law is" and then continued:

> This decision declared the basic principle that the Federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system.

In *Martin* v. *Hunter's Lessee* (1 Wheaton, 304 (1816)), the State of Virginia had confiscated land grants relying on a statute prohibiting aliens from inheriting real property.

In 1813, the Supreme Court ruled against Virginia's action but the State's court of appeals held that section 25 of the Judiciary Act of 1789 was unconstitutional and refused to obey the mandate. Section 25 of the Judiciary Act authorized the Supreme Court to review any State court decisions that challenged the validity of Federal authority.

The case was again brought before the Supreme Court in 1816, and Justice Story logically, learnedly, and thoroughly delivered a telling blow to the compact theory and sustained the theory of the basic constitutional right. He held that the Supreme Court review of State laws is necessary to maintain uniformity of decisions throughout the whole United States. I quote from the decision in the case of *Martin* v. *Hunter's Lessee* (1 Wheaton U.S. 304):

> The third article of the Constitution is that which must principally attract our attention. * * * The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not without violation of its duty, have refused to carry it into operation. The judicial power of the United States shall be vested [not may be vested] in one supreme court and such inferior courts as Congress may, from time to time ordain and establish.
>
> If then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist: That Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress is bound to act in preference to others.

We are suspending for a period or taking away from the citizen a basic constitutional right guaranteed by the Federal Constitution.

Up to now I have outlined some of the methods by which Congress has sought to control the Supreme Court. In the 85th Congress the general preemption proposal, the modification of the loyalty and passport statutes were legislative means of control that did not touch the Constitution. Similarly back in the famous so-called Court-packing plan of the New Deal, the proposal was not to suspend constitutional rights and privileges but to expand the Supreme Court in the hope that newly appointed judges would reverse the previous decisions of the Court.

Another technique that has been adopted is to take away the remedy from the citizen so that it is admitted that he has a basic right but no remedy to enforce that right. It is contended that this is what is being done in this case. I have been unable to satisfy myself as to whether or not the requirement of due process with respect to judicial review of constitutional questions means that such review by the Federal courts, but our concept of Federal supremacy dating from Marbury against Madison and reiterated in cases whose numbers are legion would seem to argue that it does.

The pending amendment is directed to any Federal court. It would leave to the State and local courts the enforcement of Federal constitutional rights of individuals. In *Bush* v. *Orleans School Board* (D.C., La.), 188 F. Supp. 916, 924–925 (1940), affirmed, 365 U.S. 569, the Court quoted from "Warren's Supreme Court in U.S. History," volume 1, pages 27–28, 1923 edition, as follows:

> Changes * * * restricting the appellate jurisdiction of the Court * * * would result in leaving final decision of vastly important national questions in the State or inferior Federal courts, and would effect a disastrous lack of uniformity in the construction of the Constitution so that fundamental rights might vary in different parts of the country.

The question here, then, is whether or not the Congress can suspend jurisdiction of the Federal courts over legislative apportionment which has been held to involve a basic constitutional right. In removing the remedy and directing a legislative act suspending the jurisdiction of "any court" to exercise either original jurisdiction or review of a question concerning the violation of the Constitution of the United States, does not Congress exceed its constitutional power?

The existing statutes relating to original jurisdiction that would be amended by implication by the Dirksen-Mansfield rider are:

> SEC. 1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY; COSTS.—
>
> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. (June 25, 1948, ch. 646, 62 Stat. 930; July 25, 1958, Public Law 85–554, sec. 1, 72 Stat. 415.)
>
> SEC. 1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE.—
>
> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right of privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.
>
> (June 25, 1948, ch. 646, 62 Stat. 932; Sept. 3, 1954, ch. 1263, sec. 42, 68 Stat. 1241; Sept. 9, 1957, Public Law 85–315, pt. III, sec. 121, 71 Stat. 637.)
>
> SEC. 2281. INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTE; THREE-JUDGE COURT REQUIRED.—
>
> An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. (June 25, 1948, ch. 646, 62 Stat. 968.)
>
> SEC. 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS.—
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. sec. 1979.)
>
> SEC. 1988. PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS.—
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having judisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R.S. sec. 722.)

In addition this would affect the various provisions of the Civil Rights Act of 1964, Public Law 88–352.

Some of the statutes relating to appellate procedure and review that would be altered and amended by implication by the adoption of the Dirksen-Mansfield rider are:

> SEC. 1253. DIRECT APPEALS FROM DECISIONS OF THREE-JUDGE COURTS.—
>
> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice of hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, ch. 646, 62 Stat. 928.)
>
> SEC. 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS.—
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> * * * * *
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such

appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

SEC. 1257. STATE COURTS; APPEAL; CERTIORARI.—

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws or the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. (June 25, 1948, ch. 646, 62 Stat. 929.)

SEC. 1441. ACTIONS REMOVABLE GENERALLY.—

* * * * *

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

SEC. 1984. SAME; REVIEW OF PROCEEDINGS.—

All cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court. (Mar. 1, 1875. ch. 114, sec. 5, 18 Stat. 337.)

Article III of the U.S. Constitution gives to Congress authority over the inferior Federal courts. The article is as follows:

SECTION 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time obtain and establish. * * *

SEC. 2. The judicial power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States. * * *

Congress has changed the jurisdiction of the inferior courts from time to time. For example, in 1801 in the words of the Constitution, Congress granted the inferior Federal courts jurisdiction of "all cases in law and equity, arising under the Constitution and the laws of the United States." The next session of Congress withdrew this broad grant of power. In 1875 the Federal "inferior" courts were given jurisdiction over cases where the amount in controversy was $500 or more, in 1887 this was increased to $2,000, in 1911 to $3,000 and in 1958 to $10,000. But this is not a case for the enforcement of a right to collect $500 or $2,000 or $10,000 in a damage suit. This is a question of enforcement of a constitutional right.

As for review, the Congress has almost always granted review to the U.S. Supreme Court from decisions of the district court.

The power granted to the judiciary in article III of the Constitution is not self-enacting insofar as the inferior courts are concerned. In 1793 Justice Iredell in *Chisholm* v. *Georgia* (2 Dall 419, 423) said:

I conceive that all courts of the United States must receive, not merely their organization as to the number of judges of which they are to consist; but all their authority, as to the matter of their proceeding from the legislature only.

In 1789 Congress forbade diversity of citizenship suits on promissory notes, and this was sustained as a valid power of Congress:

The judicial power [except in a few specified instances] belongs to Congress.

In Bank of the United States against Deveau, the Supreme Court said that a right to sue does not imply a right to sue in Federal Court unless such power is expressly granted by an act of Congress.

In *Stuart* v. *Laird* (1 Cr. 799 (1803)), the Supreme Court affirmed the power of Congress to remove a suit from one circuit to another. In *U.S.* v. *Hudson and Goodwin* (7 Cr. 32, 33)), the Court said:

The power which Congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects.

In *Sheldon* v. *Still* (8 How. 441, 448–449 (1850)), the question was the jurisdiction of the circuit court, Mr. Justice Grier said:

The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

The Court concluded:

Having a right to prescribe, Congress may withhold from any Court of its creation jurisdiction of any of the enumerated controversies.

Such were the early cases. They have been cited over and over again as sustaining the power of Congress to withdraw from the "inferior" Federal courts original jurisdiction to adjudicate certain categories of cases.

But these cases deal with statutory rights and with the existence of remedies. The cases do not deal with judicial review. They do not raise constitutional questions. In a very cursory survey in the time at hand, I have found but one case which did specifically treat the constitutional question. This was *Mayor of Nashville* v. *Cooper* (6 Wall. 247, 251–2 (1868)). In that case the Court—Justice Swayne—prefaced its decision with the usual and familiar rule:

This Court has the power to declare an act of Congress to be repugnant to the Constitution, and therefore invalid. But the duty is one of great delicacy, and only to be performed where the repugnancy is clear, and the conflict irreconcilable. Every doubt is to be resolved in favor of the constitutionality of the law.

The circuit court decision, according to Justice Swayne's opinion, proceeded "entirely upon the grounds of constitutional invalidity." Therefore, it is appropriate to take into consideration the discussion that this case made of the question even though the actual decision was on another issue. Here are some quotations from the decision:

The Constitution provides, that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," and that this power "shall extend to all cases, in law and equity, arising under this Constitution and the laws of the United States."

The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. "All cases" so arising are embraced. None are excluded. How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed.

Later:

As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given the Court the power to take it, and an act of Congress must have supplied it. There concurrence is necessary to vest it. It is the duty of Congress to act for that purpose up to the limits of the granted power. They may fall short but cannot exceed it. To the extent that such action is not taken, the power lies dormant.

As to leaving the Federal constitutional question to be determined by the State courts, the Court had this to say:

It is the right and the duty of the national government to have its Constitution and laws interpreted by its own judicial tribunals. * * * The courts of the several States might determine the same questions in different ways. There would be no uniformity of decisions.

It would appear that these early cases have uniformly held that all jurisdiction may be removed from the inferior courts, that jurisdiction must be specifically granted and if not granted lies dormant.

The general authority in the Supreme Court to review constitutional questions in the absence of statute granting such an authority is more doubtful. In *Chisholm* v. *Georgia* (2 Dall. 419, 423 (1793)), Justice Iredell held:

I conceive that all the courts of the United States must receive not merely their organization as to the number of judges of which they are to consist; but all their authority, as to manner of their proceeding, from the legislature only.

In another discussion of this question I will review in detail some of the early cases, both on the authority of the inferior Federal courts and on the imposition of the power in Congress to delimit appellate review and withhold and withdraw jurisdiction from the Federal courts.

Suffice to say at this time that the most celebrated case is *Ex Parte McCardle* (6 Wall. 318 (1868); 7 Wall. 506 (1869)). McCardle was arrested by the military authorities under the provision of the Reconstruction Acts. He filed a petition for a writ of habeas corpus alleging unlawful restraint and challenging the validity of the acts. After a hearing in the Federal circuit for south-

ern Mississippi, McCardle was remanded to the custody of the military. He appealed to the U.S. Supreme Court under the provisions of the statute—14 Stat. 386. Before the Supreme Court could act, Congress enacted new legislation—15 Stat. 44—withdrawing appellate jurisdiction from the Court on "appeals which have been or may hereafter be taken." The Supreme Court said:

Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause.

It should be noted, however, that the statute is strictly interpreted and it is only an appeal to the Supreme Court that was taken away. There still remained a right to appeal to the circuit courts in habeas corpus proceedings.

It is this strict construction and the actual fact that McCardle was very narrowly limited that has permitted scholars to suggest that McCardle is not authority for full and complete power over the appellate jurisdiction of the Federal courts.

There are cases under the due-process doctrine that seem to indicate that Congress cannot prevent a test of the constitutionality of a statute, see for example, *United States* v. *Carolene Products Co.* (304 U.S. 144 (1938)):

We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts * * * a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

The same is true of the supremacy doctrine for instance in *St. Joseph Stock Yards Co.* v. *U.S.* (298 U.S. 38), Justice Brandeis commented:

The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated were conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate questions of constitutionality.

If the Dirksen amendment, or the even more restrictive Tuck bill, is enacted there will be withdrawal and withholding from the inferior and the appellate courts of any power of enforcement of an individual constitutional right. No Congress has gone so far, no court has yet been confronted with so far reaching a proposition as this one that directs "any court" to withhold enforcement. I have grave doubts that the legislative branch of Government can so completely dominate the judicial branch in a constitutional question. In a future speech I will analyze the different cases and attempt to demonstrate that suspending both original and appellate jurisdiction over State apportionment cases is violative of the due-process clause of the fifth amendment.

But even if it is conceded that the Congress has a right to withhold, to suspend and to withdraw individual constitutional rights, it is wrong in principle.

A basic doctrine of our American Government is that of separation of powers. The three departments of Government "should be kept completely independent of the others, so that the acts of each shall not be controlled by, or subjected to, directly or indirectly, the coercive influence of neither of the others—*Humphrey* v. *U.S.* (295 U.S. 602).

Ours is a government of law. Judge John J. Parker, in an eloquent article in the American Bar Association Journal, volume XXXVI, page 523, 1950, said:

Society, whether a free society or not, is not a mere aggregation of individuals. It is an organism. The law is the life principle of that organism.

This respect for law is basic to us. If we can overturn the fundamental law of the Constitution by taking away or withholding a man's constitutional right to having a vote equal to that of other men, then we can take other constitutional rights away in the same manner. There are those that complain that murders and assaults in Mississippi are not being punished because of the difficulty of getting convictions by a jury. But shall we take away the right to indictment and jury trial? Such a right would be endangered if we embark on this first step. The freedoms of the press and of speech, and of religion can be taken away in the same manner and the Bill of Rights set aside, as I suggested previously to the Senator from Wisconsin, and the entire Bill of Rights could be set aside.

Prof. Bernard Schwarz, a student of the French political system pointed out:

The French experience shows that a constitution which cannot be judicially enforced contains but empty words. It is judicial review which ensures that the American Constitution is not violated and gives that instrument its practical meaning. It is the failure of the French courts to assert a review power over the constitutionality of acts of the legislature that has made the various constitutions in France mere paper instruments.

In Russia, Vyshinky once said:

From top to bottom the Soviet social order is penetrated by the single general spirit of the oneness of the authority of the toiler. The program of the All-Union Communist Party (of Bolsheviks) rejects the bourgeois principle of separation of powers.

Madison, writing in the Federalist, said:

[I]t may clearly be inferred that, in saying, "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he [Montesquieu] did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

The contest between the three departments in National, State, and local governments still goes on from day to day with varying results, but with all of the skirmishes, sometimes none too edifying, the goal remains constant—a government of law rather than of official will or whim. This goal can only be attained by a government of limited powers distributed both vertically and horizontally, as a glance at the dictatorships of today and yesterday will demonstrate to all who are willing to learn from the experience of others.

These views are in marked contrast to those of the Founding Fathers. Washington, in his Farewell Address, warned:

The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.

John Adams reasoned:

It is by balancing each of these three powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved in the Constitution.

Jefferson was of the same mind:

The concentrating of these in the same hand is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single one; 173 despots would surely be as oppressive as 1.

Madison was equally emphatic:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of "tyranny."

No concept of government has been so unanimously accepted by all the statesmen whose genius brought into being the American Nation as has the doctrine of the separation of governmental powers.

I am convinced that the Dirksen amendment is wrong, it is wrong in the spirit of the Constitution, it is wrong in the principle of the separation of powers, it is wrong in the doctrine of the supremacy of the law. It should be rejected.

SENATOR METCALF'S GREAT SPEECH ON LEGISLATIVE APPORTIONMENT

Mr. McGOVERN. Mr. President, one of the great speeches of this Congress was delivered today by the thoughtful junior Senator from Montana [Mr. METCALF]. Senator METCALF, a distinguished jurist in his own right, has carefully traced the mistaken notions on which the Dirksen apportionment amendment is based. He has made perfectly clear that the Dirksen proposal would create a dangerous precedent under which Congress could prevent the courts from protecting basic American constitutional rights. In this case, the equality of individual voting rights for all citizens is